Office-Supreme Court, U.S.
FILED
SEP 28 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963.

No. 349.

MARION J. BERGUIDO, individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3d, by their Guardian, MARION J. BERGUIDO,

Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

B. Nathaniel Richter,
Charles A. Lord,
Seymour I. Toll,
Arthur G. Raynes,
Richter, Lord, Toll & Cavanaugh,
121 South Broad Street,
Philadelphia 7, Pennsylvania,
Counsel for Petitioners.

Frank F. Truscott,
Truscott, Kline,
O'Neill & Howson,
Of Counsel.

International, 711 So. 50th St., Phila. 43, Pa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 349.

MARION J. BERGUIDO, INDIVIDUALLY, MARION J. BERGUIDO, ROBERT G. ROWE, AND WARREN H. WOODRING, EXECUTORS OF THE ESTATE OF CARLOS BERGUIDO, JR., AND JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO AND CARLOS BERGUIDO, 3D, BY THEIR GUARDIAN, MARION J. BERGUIDO,

Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

Respondent has impugned the motives of petitioners' counsel. It has suggested that a member of the Court of Appeals was "induced" into a dissent. It has misquoted the trial record.

Respondent's brief frustrates the search for truth which adversary proceedings are supposed to be. It is also a profound demonstration of just how meritorious this Petition is. The magnitude of the irresponsibility of respondent's brief is a revealing measure of the dimensions of the issues it has tried to disguise.

Unlike the respondent, we have presented a thorough and accurate discussion devoted strictly to the facts and law. We did so in our Petition.

While we do not believe that this Court will be diverted by respondent's intemperate and inaccurate statements, this reply is submitted ~~so that~~ the Court may be made aware of just what respondent is about.

ARGUMENT.

I.

Contrary to Respondent's Naked Accusations, There Is No Evidence to Support the Court of Appeals' Holding (1) That Searle's Testimony Was Hearsay or (2) That Schmidt Had Had to Make Any Assumptions.

For all its irresponsibility, respondent has maintained a certain consistency throughout these appellate proceedings: it remains completely silent on the merits.

When our petition for a rehearing informed the Court of Appeals of its manifest error in its finding that Schmidt had to make certain assumptions in the face of a record devoid of such evidence, this respondent stood mute and suggested nothing to support such a finding. We now find that after the fury of its argument has dissipated, respondent is still speechless on this issue. It has cited this Court to absolutely nothing in the trial record notwithstanding bald assertions such as this at page 6 of its brief:

> "In so contending, petitioner flies in the face of Searle's candid and explicit testimony to the contrary."

What "candid" testimony? What "explicit" testimony? What are the page references? Where may this Court find a shred of evidence to demonstrate that Searle did *not* personally check the entire report? Where is the "record" respondent describes when it says at page 6 of its brief that "The record is unequivocally to the contrary . . ."?

On petition for rehearing below we pointedly informed the Court of Appeals that plaintiff's case was barren of any evidence that Schmidt made any assumptions. Defendant stood mute then. Now at page 7 of its brief it comes forward arguing not that Searle testified contrarily, not

that there is any evidence in plaintiff's case to show that assumptions *were* made but that our ". . . tactic . . . is to twist a negative answer—a disclaimer of knowledge—into authority for an affirmative proposition. . . ."

In fact, this is what we *did* say at page 17 of our Petition:

> "Searle was asked on cross-examination whether he knew of his own knowledge that Schmidt had made any assumptions and his answer was 'No, sir' (254a)".

If this be "twisting" anything, that verb should now have added to its definition: to describe accurately.

Finally driven to say something, respondent now finds itself unavoidably having to confess that the Court of Appeals *did* stamp the testimony of defendant's witness LaVake as credible. But rather than do so, it behaves as if attacks on the motives of counsel will ameliorate the harm the decision below inflicted on trial by jury.

The record before Chief Judge Clary, as contradistinct from respondent's imagined record, justified these conclusions:

> 1. Searle checked Schmidt's calculations predicated on the figures Searle had given to him. The testimony was therefore not hearsay. That determination was one involving a preliminary question of fact which an appellate court has no power either to make or disturb if it be fairly supported by the evidence, as surely this was. *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94, 34 S. Ct. 229 (1913). Respondent refused to face this authority or the actual record which fully justifies *Gila's, supra*, application.
>
> 2. Schmidt made no assumptions. The fact that LaVake's testimony was the only evidence in the record asserting that there was one assumption does not justify the Court of Appeals crediting that *oral* testimony which appeared *only* in defendant's case,

not that of the plaintiff. The jury alone had the right, either to accept or reject such oral testimony. They did not believe it, and the command of the VIIth Amendment of the Constitution ends the matter there. The Court of Appeals erred in not accepting such a conclusion. It had no power to do otherwise. In doing otherwise, it deprived petitioner of her right to trial by jury. That is one of the reasons we are now here.

II.

The "Inducement" of Judge Kalodner.

In footnotes at pages 3 and 7 of respondent's brief appear statements about Judge Kalodner's dissent. These statements accuse counsel of sinister designs and Judge Kalodner of having been guiled.

As to the accusations against us: we protest.

As to the implications about Judge Kalodner: to defend a member of the federal judiciary against such charges would take even more effrontery than respondent displays in making them.

Let it be noted that Judge Hastie also voted to grant our Petition for a Rehearing. What theory has respondent about Judge Hastie's vote? What has respondent to say about the gullibility of that member of the Court of Appeals?

III.

Respondent Misquoted the Trial Record.

At page 6 of respondent's brief appears this alleged colloquy from the trial record of Searle's testimony:

> "Q. Do you know how Mr. Schmidt did this or what computations he used in arriving at these figures?
>
> A. No, sir; I *did* not." (Emphasis supplied.)

In fact, this is what Searle's answer was in the trial record:

"A. No, sir; I *do* not." (254a) (Emphasis supplied.)

Considering how unsparing and how undocumented respondent's treatment of the record has been, it is perversely consistent indeed for when it does quote from the record, it is inaccurate. If this arose from simple carelessness, it was inexcusable for respondent to allow that sort of thing to get before this Court. If it arose from something else, carrying implications which only respondent could disclose, it speaks disturbingly again of just how this meritorious Petition has been resisted.

Evasion rather than confrontation; accusations rather than responsible discussion; hollow statements and misquotation rather than documented treatment of this record — such has been the respondent's presentation of this case.

IV.

Both 49 U. S. C. § 1441(e) and the Federal Business Records Act, 28 U. S. C. § 1732(a) Are Squarely Raised by the Decision Below.

The argument respondent makes at page 8 of its Brief is written as if the opinion below did not exist. In truth, that opinion unequivocally *construed and applied* both 49 U. S. C. § 1441(e) and the Federal Business Records Act, 28 U. S. C. § 1732(a), and that opinion is now both the law in this case and an appellate holding which will be used as an authority for bench and bar on the two statutes involved.

The decision below did not dispose of the question of the Business Records Act on any such grounds as the lack of a formal offer. On the contrary, and, as the Court of Appeals said, "[m]ore fundamentally" (7c) involved was the relationship between the two statutes on this evidence.

If this case has to be retried, the trial judge will be bound to the law of the case laid down by the Court of Appeals. Unquestionably the trial judge will have to reject the report as a business record. Thus respondent's argument amounts to no more than an attempt to foreskill the review of a matter which was squarely resolved.

Furthermore, the opinion of the Third Circuit creates an intolerable situation when it is studied with respect to its ruling on the relationship between § 1441(e) and the Business Records Act.

This opinion undoubtedly will be of extreme importance to lawyers and trial judges on questions of admissibility of C. A. B. evidence in future air disaster cases. In its initial discussion of the prohibition of § 1441(e) the opinion is quite clear. It holds that the purpose of the provision is to exclude those portions of ". . . CAB reports which express agency views as to the probable cause of the accident". (6c). The opinion then specifically holds that:

> ". . . the testimony of Searle as to the calculations made by Schmidt certainly does not come within the ambit of the privilege. His was not evaluation or opinion testimony, for it reflects in no way the CAB's findings as to the probable cause of the crash." (6c)

Thus far the opinion is clear and correct. Its holding cannot be misconstrued, and it states a definite rule which trial courts and lawyers may properly follow.

But the opinion then states:

> ". . . to admit these reports for the reason plaintiff names would be to ignore explicit congressional policy, [fn.] which we decline to do." (8c)

Is a trial judge to be governed by the previous statement and admit those portions of the report which do not

reflect the probable cause of the accident, or is he to follow the later conflicting statement and reject them on the basis of "explicit congressional policy"?

We submit that these questions demand review and that this Court should take this opportunity to clarify the law of the Business Records Act in air disaster cases and all other cases as well.

CONCLUSION.

Genuine and important issues are at stake here. They measure up to the conditions which justify the grant of the Writ. Respondent has shown literally nothing to dilute the merit of our prayer. Its most unfortunate mistreatment of the case only underscores the need for the grant of that prayer.

The Writ should issue.

Respectfully submitted,

B. Nathaniel Richter,
Charles A. Lord,
Seymour I. Toll,
Arthur G. Raynes,
Richter, Lord, Toll
& Cavanaugh,
Counsel for Petitioners.

Frank F. Truscott,
Truscott, Kline,
O'Neill & Howson,
Of Counsel.